

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
STEPHEN SAVAGE,
Complainants

v.

DOCKET NO. 10-BEM-02259

MASSACHUSETTS REHABILITATION
COMMISSION
Respondent

Appearances: Howard Mark Fine, Esq. for Complainant
Michael A. Capuano, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 31, 2010, Complainant Stephen Savage filed a charge of discrimination alleging that he had been subjected to employment discrimination by his former employer, Respondent, Massachusetts Rehabilitation Commission on the basis of disability (Dyslexia and Attention Deficit Disorder) The Investigating Commissioner found probable cause to credit the allegations of the complaint and conciliation efforts were unsuccessful. The matter was certified for a hearing. After the close of discovery, Respondent moved for summary judgment. The matter was remanded to the Investigating Commissioner for reconsideration of the probable cause finding and the Motion was denied. A public hearing was held before the undersigned hearing officer on October 13, 14, 15 and 22, 2015. The parties submitted post-hearing briefs in

February of 2016. Based on a review of the record before me and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Stephen Savage, suffers from Dyslexia, an impairment which affects his rate of learning, ability to process information and writing ability. Complainant also suffers from Attention Deficit Disorder (ADD) which is manifested by symptoms such as distractibility and difficulty maintaining focus on a particular subject. Complainant also has a history of chronic depression. (Testimony of Complainant; Robert Savage; Jt. Exs. 74-76, 103, 104, 107)

2. Complainant received special education services throughout his elementary school years. After graduating high school, Complainant attended a program at Curry College for two years to prepare students with learning disabilities such as Dyslexia to succeed in college. (Testimony of Complainant; Robert Savage) Complainant subsequently took some evening courses at Boston College and later matriculated at the college and graduated with a degree in Economics. (Testimony of Savage; Jt. Ex. 1, 13, 17)

3. Complainant has an employment history that includes working in social services and has significant educational and work experience in Vocational Rehabilitation. He was employed as a direct service provider at Charles River Association for Retarded Citizens, assisting clients transitioning from group homes to more independent living situations. In 2002, Complainant earned a Master of Education (Rehabilitative Counseling) from UMass. His course work included vocational rehabilitation and analysis, history of disability rights and group and individual counseling. (Savage Testimony, Jt. Exs. 13, 14) Complainant is also certified as a Rehabilitation Counselor. Prior to working at Respondent, he was employed part-time by the New England Center for Homeless Veterans, first as an activities coordinator and later as a

Rehabilitation Counselor. (Savage Testimony, Joint Ex 1, 16) He also worked as a Residential Counselor at the North American Family Institute, as a Vocational Counselor at the Community Healthlink Program of Assertive Community Treatment, and as an Extended Community Counselor for Gould Farm. (Savage Testimony, Jt. Ex. 1)

4. Respondent Massachusetts Rehabilitation Commission (MRC) is a state agency servicing individuals with disabilities. The Division of Disability Services (DDS) reviews and processes some 80,000 to 85,000 initial claims for federal disability benefits per year. The DDS division of MRC is funded through the Social Security Administration which mandates regulations and protocols. (Cutting testimony)

5. In July of 2009, Complainant applied for a position as a Vocational Disability Examiner (VDE) which was advertised on Respondent's website, by electronically forwarding his cover letter and resume. On his application, Complainant checked the box indicating that he chose to self-identify as a person with a disability. Complainant was interviewed by the Director of Respondent's Division of Disability Services, John Reilly, Lori Stevens, MRC/DDS Director of Case Processing and Johnnie Williams, former regional director at MCR/DDS. MCR's selection committee rated Complainant on his ability to "perform the job function" with the highest score on the scale which was "outstanding." (Stipulated Facts; Jt. Ex. 18)

6. Respondent offered Complainant a VDE position in its DDS Boston office, which he accepted. Respondent determined that Complainant was eligible to receive a recruitment rate at a higher grade and above the entry level rate of compensation. Complainant began his employment with Respondent on October 13, 2009 at the age of 51. (Stip. Facts; Jt. Ex. 19; Ex. R-136A) Complainant testified that he was excited to join MRC as he believed the agency was

tops in helping people with disabilities. His career goal was to eventually provide one-on-one rehabilitation counseling services to MRC's clients with disabilities. (Testimony of Savage)

7. Pursuant to a Collective Bargaining Agreement, VDE's are on probation for the first six months of their employment. During this period they have no vested union right to grieve whether management's reasons for an adverse personnel action, including termination of employment, are for just cause. Entry level VDE's are required to successfully complete an in-house training program lasting approximately 12 weeks. On October 13, 2009, Complainant commenced training with nineteen other probationary employees in Boston and eight other trainees who participated off-site via video conferencing. The training ended the week of December 28, 2009. (Stip. Facts; Jt. Ex. 24)

8. At all times material to Complainant's employment, Genevra Cutting was Respondent's Training Director. She served in this position from 1998 until 2007 when she retired from MRC, and reported to DDS Director, John Reilly. Cutting began her career with MRC in 1985 as a VDE and transferred to the training department in 1998. She testified that she and another employee redesigned the training program to be computerized and for trainees to work on live cases. The training included instruction in the computer software system known as AS 400. (Cutting and Connelly Test; Jt. Exs. 93, 113) According to the job description of Training Director, the primary responsibility is:

“...to design and implement an agency training and development plan that defines systems and policy and procedure requirements to provide employees at all levels with the skills, knowledge and attitudes needed to develop claims and conduct vocational analysis to determine if a claimant is unable to work and is eligible for benefits...”

(Jt. Ex. 8)

9. The general nature of the VDE position is to determine initial and continued eligibility of Massachusetts applicants for federal SSI and SSDI public benefits. An entry level VDE works under the supervision of a higher level VDE and is responsible for obtaining, reviewing, analyzing, and evaluating medical evidence and vocational profiles of applicants for benefits; and conferring with medical consultants to evaluate diagnoses to determine a claimant's ability to work, the need for further testing, and eligibility for social security disability benefits. (Savage and Cutting Testimony; Exs. 4-6) Entry level VDE's receive ongoing review of their work and on-the-job training. (Jt. Ex. 6) Cutting testified that it takes between two to four years for a VDE to master the duties and responsibilities of the position.

10. Complainant testified that he had basic computer skills and experience using Microsoft Word. At the time Complainant was hired, neither the job description for the VDE position nor the VDE class specification published by the Massachusetts Human Resources Division, listed as an essential function of the VDE position the use and or operation of Respondent's AS 400 computer system for tracking and processing development of a case. Nor was there any requirement that the applicant possess sophisticated knowledge of computer software. (Jt. Exs. 4-6; 26)

11. The training class outline for the Fall of 2009 shows that trainees were instructed through lectures and hands-on training on the definition of and identifying disabilities, including mental impairments, use of the AS400 computer system, and how to prepare "day 1 development." (Jt. Ex. 24; 27) Respondent uses the term "day 1 development" to connote the steps taken to gather and review medical information about a claimant's purported disability in order to adjudicate whether he or she is eligible for benefits. (Savage and Cutting Testimony) The majority of the training focused on teaching probationary VDE's how to adjudicate claims in

a computer lab environment. Trainees were provided with voluminous training manuals, (See e.g. Jt. Ex. 26) access to the internet, access to an electronic dictionary, check-lists on work procedures, and access to a folder noting the most requested sections of the various manuals. Trainees were evaluated using periodic quizzes to test their knowledge of the subject matter taught and a two-part Federal Test, all of which Complainant successfully passed. (Savage and Cutting Testimony; Jt. Exs 24-28; R. Ex. 117)

12. Mary Connelly was Respondent's Director of Diversity/ADA Coordinator/Human Resources Liason. Connelly testified that part of her role was to explore and assist in providing reasonable accommodations to Complainant and other disabled employees. On October 22, 2009, Connelly emailed Complainant that it had come to her attention belatedly that he desired to voluntarily self-identify as a person with one or more disabilities. (Connelly Testimony ; Jt. Ex. 20) Complainant testified that he did not seek any specific accommodation at the time of his application or interview because he no advance knowledge of the challenges he would encounter in learning the IBM AS 400 computer system, because it was important to him to be perceived by his employer as competent and because he wanted to fit in and be treated the same as his fellow employees. (Savage Testimony Jt. Exs. 18, 25)

13. Complainant's training was primarily delivered by Cutting and her subordinates, Pat Dickson and Sheila Buckley. According to Cutting, Complainant's class size was fairly large. (Cutting Testimony) The Training Department's computer lab where most of the training occurred was a noisy environment, which posed a significant distraction to Complainant, given his ADD. (Savage Testimony) Soon after he began his training, it became apparent to the Training Department that Complainant was falling behind other students in the class. (Jt. Ex. 30; Ex. R-88A; Ex. R-98) On November 9 and 18, 2009, Cutting wrote terse emails to Complainant

demanding that he pay attention to the lecturer. In the first email she wrote, "What are you doing? You need to pay attention..." In the second email she wrote, "I don't want to see this again. I don't want to have to tell you to pay attention again." Complainant testified that Cutting's tone was curt and rude and upset him. According to Complainant, he understood vocational analysis and the other subjects covered in training and had no trouble processing the substantive material. However, due to the rapid pace of instruction, his keyboarding and computer skills, his Dyslexia and ADD, and the noise level in the training room, Complainant was unable to accurately enter information into the computer system at the same speed as the instructors spoke, relative to the other trainees in the class. (Savage Testimony; Jt. Ex. 33) Jt. Exs.

14. On November 13, 2009, Cutting wrote a fake email purportedly from Complainant stating that he wanted to resign from DDS, and she replied to him in a fake email that she was sorry he wanted to resign and would pass his email on to HR. Cutting testified that this was all a joke and something she often did to remind trainees of the importance of locking their computers if they were away from their station, because of the confidential material being handled. (Jt. Ex. 29) Complainant was not appreciative of Cutting's attempt at humor and seemed befuddled by the incident. He confronted Cutting telling her that he did not intend to resign and the email was not authentic. He testified that it left him distraught and shaken up for the entire day. (Savage Testimony) I find that Cutting's action was an insensitive and an inappropriate way to convey this concept to Complainant given that he was clearly fragile and sensitive about his disabilities.

15. On November 17, 2009 Cutting sent an email to John Reilly, Lori Stevens and Johnnie Williams entitled, "Stephen Savage is having a hard time" detailing some of the errors Complainant had made, and indicating that he tests well and scores well on his tests but "we

have concerns about his ability to manage the computer.” (Jt. Ex. 30) On November 18, 2009, Cutting met privately with Complainant and told him she noticed he was struggling with the material. Cutting testified that Complainant did not disclose the nature of his disability to her, nor did he discuss his functional limitations or the need for a particular accommodation.

(Cutting Testimony) Notwithstanding, Cutting stated it was obvious to her that Complainant’s job performance issues [e.g., easily distracted, not paying attention, not following instructions, not processing material as quickly as other trainees, etc., (see Jt. Exs. 41, 46, 48)] might have been attributable to a mental impairment, possibly ADD. She stated that she offered Complainant one-on-one instruction and asked him to narrow down the subjects he was having trouble with on the AS 400 computer system, and what Respondent could do to help him.

(Cutting Testimony; Jt. Ex. 36)

16. Complainant’s version of this meeting was strikingly at odds with Cutting’s. He testified that after sending him a caustic email reprimanding him for not contacting doctors as instructed, beginning with, “if you had bothered to read the whole note, you would have seen...” and then ordering him to comply with her directive. Complainant replied that he had written to the sources and his problem was with the computer system. (Ex. 35) Cutting then directed him to come to her office and Complainant claimed she had a temper tantrum, slamming her fists on the desk and proceeding to “ball out” Complainant, talking down to him, accusing him of slowing down the class, falling behind, not following instructions, and telling him he could not do the job. He testified he was afraid she was “going to hit me or something.” In an email to Reilly on November 18, 2009 Cutting stated “we have a problem” with Savage, and admitted that when she brought Complainant into her office to talk about why he refused to follow instructions, she was so frustrated, she thought she “was going to hit him over the head.” (Ex. R-

98 pp. 39-40) I credit Complainant's testimony about Cutting's behavior and that he was very intimidated by her. Complainant testified that in response to her tirade, he disclosed to her that he had Dyslexia and could not type as fast as other people, but Cutting denied any disclosure of his disability before mid-December 2009. (Savage Testimony; Cutting Testimony)

17. Complainant testified that while he had initially attempted to seek help in class by raising his hand to ask questions about a particular instruction, something trainees were encouraged to do, after a few days he noticed that Cutting and Buckley became, not only visibly impatient with him, but would also ignore him, and alternatively take turns reprimanding him and scolding him for asking questions or making mistakes. He also claimed that he was singled out in class and berated before his peers for making errors and was embarrassed and humiliated by the instructors noting that he was falling behind. (Savage Testimony) I credit Complainant's testimony that he was berated in class and felt belittled and humiliated by Cutting. This behavior is consistent with the tone and substance of Cutting's emails to Complainant and others, admonishing him as if he were a disobedient child and admitting that she had no patience with him. In her November 18, 2009 email to Reilly she noted problems with Complainant's computer skills, that he was falling behind and not catching up, and that she kept telling him he needed to pay attention to stop making so many mistakes. She also wrote to Reilly, "I am at my wits end with him....I'm going to pass him off to Eileen (Daly), maybe she has more patience with him than I do right now." (Jt. Ex. 35, 36, R. Ex 98 pp. 39-40)

18. After Complainant's meeting with Cutting on November 18, 2009, Complainant did not talk much with Cutting because he felt she was hostile to him. He stated that he "kept his mouth shut and worked as hard as he could, coming in early and leaving late, and followed instructions as best he could." After that meeting he also sent an email to Connelly to let her know that he

was struggling at work and asked her to resend the forms for Self-Identification and requests for reasonable accommodation she had sent on October 22, 2009, “in the event” that he needed reasonable accommodations. He also stated in that email that he had had a learning disability throughout his life and was currently having symptoms of attention deficit disorder. (Jt. Ex. 21) Complainant submitted the Self-Identification form to Connelly but did not request any specific accommodation.

19. On November 19, 2009, Cutting assigned Pat Dixon to work with Complainant to “help him get a better handle on the AS400.” Complainant thanked her and told her he thought this was a good plan, because he thought he would receive help learning the computer system. Complainant was directed to leave the training class at assigned times to attend one-on-one tutoring sessions with Pat Dixon. Respondent claimed that Complainant attended only a few tutoring sessions, and he admits he did not attend all of these sessions claiming that he did not find them helpful. Complainant asserted that he felt singled out and stigmatized for having to leave class and it resulted in his falling farther behind. He also claimed that Dixon was assisting him with Day 1 development something he claimed he was capable of doing, but not with understanding the computer system. (Jt. Ex. 33, Testimony Complainant) Complainant was not given remedial training on the AS400 computer system during or after his formal training ended; nor was he assigned to work on computer issues with Sheila Buckley, another trainer, who was the department’s computer expert on the AS 400 and understood the software better than anyone in the department. (Jt. Ex. 36; Ex. R-162, Cutting Testimony; Buckley performance evaluation)

20. From November 23, 2009 until December 4, 2009 Complainant attended private tutoring sessions with Dixon. (Cutting and Savage Testimony; Jt. Exs. 38, 42, 43, 46) Connelly testified that she was aware of this and supported the decision. Emails between Cutting and Dixon during

that time reflect ongoing concerns about Complainant's mistakes and failure to read computer messages that were sent to him, and his failure to send out requests to appropriate medical providers. It is clear that Complainant was having significant problems with not only the computer system, but also with Day 1 development and was failing to contact the appropriate medical professionals. (Jt. Exs. 37, 38, 39, 40, 44, 45, 46)

21. On December 3, 2009, Cutting emailed Reilly and urged him to terminate Complainant immediately. (Jt. Ex. 44) She stated that her staff was devoting too much time to Complainant at the expense of the other trainees' progress, contended that Complainant was unimaginably far worse than a previous probationary employee, and demanded a decision on Complainant's future employment at MRC, stating, "this has gone on long enough and either we need to act on this guy and let him go or resign ourselves that some poor supervisor will have to deal with him once he is on the floor." Id. Cutting concluded her remarks by asking "for some direction" on now to proceed and telling him that, "I don't want to waste my time telling him how concerned I am if nothing is going to happen... and that we need to act and cut him loose now." Id. Reilly emailed Cutting back immediately advising her to: "Counsel him to leave before we formalize the termination process," and Cutting abided by his instructions. (Cutting Testimony; Ex. R-98, bates no. 000087)

22. Connelly verified and confirmed Complainant's status as a disabled employee on December 9, 2009, the date Complainant returned the forms to her. (Jt. Ex. 47) He had communicated to her that he might need accommodations for his mental disabilities and hoped to avoid any problems by disclosing his disabilities. Connelly was also advised by the training staff that Complainant "struggled" with introductory type material and was having trouble with the computer. (Connelly Testimony) However, she claimed that it was a "long, long time" before

the precise nature of Complainant's disabilities was apparent to anyone at MRC. She stated that neither Reilly, nor Stevens nor Cutting ever communicated with her that Complainant's performance problems might be related to his learning disability of ADD and she had no knowledge of his motive for emailing her on November 18, 2009. (Connelly Testimony)

23. Connelly testified that she was not aware that Cutting had complained to Reilly that the training class was suffering because the staff spent so much time with Complainant. She also claimed not to be aware of the fact that Reilly and Cutting were discussing and considering terminating Complainant prior to December 28, 2009. She claimed that when she was investigating Complainant's internal civil rights complaint after his termination, no one mentioned any intent to terminate Complainant prior to the end of his formal training. (Connelly Testimony) She was also not aware of the fact that Cutting has expressed losing patience with Complainant and passing him off to be trained by other staff because she was at her wits end with him. Connelly also denied knowing that Cutting emailed Reilly in that same communication that she felt like hitting Complainant over the head. I credit Connelly's testimony that others were not entirely forthcoming with information to her despite the fact that she had approximately 50 email communications with Cutting regarding Complainant's employment. (Connelly Testimony; Ex. R-98)

24. Complainant recalled telling Dixon and Dixon confirmed in an email to Cutting on December 14, 2009 that Complainant told her that he had a learning disability, but did not state how his learning disability affects him. (Jt. Ex. 48) She also wrote that he is a bright, pleasant, enthusiastic trainee, but is not good on the computer and has some difficulty seeing. (Jt. Ex. 48) Dixon also wrote that she did not feel comfortable that Complainant could work independently and that he does not follow directives given to him by supervisors. (Jt. Ex. 48)

25. One day later on December 15, 2009, Cutting advised Reilly that she had just met with Complainant and told him that she had serious concerns about his ability to do the job and that she was prepared to start termination proceedings against him unless he tendered his resignation within 24 hours. (Savage Testimony; Jt. Ex. 49) She gave Complainant until 2:00 p.m. on December 16, 2009 to let her know his decision. (Id.) Complainant disagreed with Cutting's assessment and asked her to sign the documents she presented to him to justify her contemplated adverse personnel action, but she "refused to sign anything." (Jt. Exs. 49, 50; Savage Testimony) He testified that Cutting's ultimatum made him feel very panicked and like "his world was spinning out of control."

26. On December 16, 2009 Complainant emailed Cutting and Connelly, notifying both of his decision not to resign. Earlier that day, Cutting had given him a job description for this position and asked him to consult with a physician so that Respondent could support him and help him succeed. (Jt. Ex. 50; 51) Complainant responded that he did not currently have a physician and was waiting for his health insurance to kick in. (Jt. Ex. 50) He indicated that he nonetheless planned to speak with a psychologist about his job, his dyslexia and her concerns about his abilities to do the job of VDE and sought his test results to present to his psychologist. Id. Cutting asked the name and address of his physician and the date of his appointment. Complainant indicated that he would see Dr. Eric Zeiff, his psychologist on December 18th and he was permitted to take the day off. Between December 15 and December 31, 2009, Cutting repeatedly asked Complainant for documentation from his medical provider describing his disability and listing any reasonable accommodations he required to do perform the work of a VDE. (Jt. Exs. 58, 59, 66, 69) Respondent did not ask permission of Complainant allowing them to solicit information directly from his medical provider for the type of information that might

help them understand the precise nature of his disability or to explain the nature of the job. Complainant testified that he did not trust Cutting to respect his privacy, and because he felt stigmatized and humiliated by her, he was resistant to provide her with confidential information about his mental health and decided to withhold Dr. Zieff's written recommendation from Respondent. Complainant felt that because he was seeking a reasonable accommodation for a medical versus a psychological condition, Respondent was not entitled to explore confidential information from Dr. Zieff concerning his mental health. He informed Cutting in an email on December 21, 2009 that the Dr. he saw had come up with a few strategies for helping him continue to work at DDS and satisfy Respondent's requirement. (Jt. Ex. 58)

27. Cutting continued to have concerns and to send emails to Reilly and Complainant about Complainant's ability to do the job. (Jt. Exs. 60, 61,62) On December 22, 2009, Complainant emailed Cutting and Connelly that he hoped to get a recommendation on how to proceed from someone with an open mind regarding the outcome of his employment. He noted that Cutting had asked for his resignation and on two occasions told him he did not have the ability to do the job. He felt that she was biased against him and that he would need to get help from a private party. (Jt. Ex. 66) That same day, Cutting emailed Riley to complain that the situation with Complainant was "nuts" and had "gotten out of control." She pleaded with Reilly for him to clarify how she should proceed, asking whether she should bring him into her office and reprimand him for not doing as he's told or "just let this stuff continue to build up?" (Jt. Ex. 60) Reilly instructed her not to do the work for Complainant, but to continue to demonstrate that he could not do the work and document her instructions. Id. On December 23, 2009, Cutting emailed Complainant that nothing had changed based on his "current job performance" and his "inability to process cases using the AS400." (Jt. Ex. 66)

28. On December 28, 2009, Connelly emailed Reilly and MRC's General Counsel that Complainant had just left her office having told her he had a letter from a psychologist attesting to the fact that he suffers from dyslexia and symptoms of attention deficit disorder. Connelly suggested he give his job description to his psychologist and ask that individual to write a letter detailing how his disabilities impact his ability to perform the essential job functions and any potential accommodations that might be helpful. She stated that he seemed receptive to her suggestions. (Jt. Ex. 67) Complainant told Connelly that the training department staff did not understand that people with his type of learning disability, Dyslexia, write more slowly and told Connelly he learns at a different rate than other people. He felt that he was making progress, liked the job, but was being pushed out the door. He expressed to Connelly that he thought his disability could be accommodated by adjusting the pace of the training and making a larger screen with larger fonts available to him since he was having trouble typing. He testified that Connelly told him she would speak to them (presumably Cutting and Reilly) about his concerns. Complainant assumed it was her responsibility as the ADA Coordinator for MRC to explore with Reilly and Cutting ways to accommodate his disability. (Savage Testimony; Jt. Ex. 67)

29. Connelly understood that people with Dyslexia and ADD might learn at a different rate of speed and testified that these impairments would not automatically disqualify Complainant from being able to learn the VDE position. She also testified that Cutting and her staff could not lawfully ask Complainant about his disabilities if he did not disclose them. She stated that unless Complainant specifically disclosed the nature of his problems to MRC staff, Cutting could only ask how she could help him if she observed him struggling. (Connelly Testimony) Connelly also confirmed that Complainant had a difficult time articulating what his limitations were. She referred Complainant to a website called the Job Accommodation Network (JAN) to investigate

ways in which individuals with Dyslexia and/or ADD could be accommodated, but did not discuss or explore with Complainant how his disabilities might potentially be accommodated. (Connelly Testimony; Ex. C-1) During her tenure in State government since 1986 Connelly handled somewhere between six and ten reasonable accommodation requests from employees with learning disabilities and mental impairments and had dealt with less than an handful of such complaints while at MRC. Id.

30. On December 31, 2009, Cutting sent Complainant an email to inform him that he was expected to bring in a letter from his psychologist no later than January 8, 2010, with the information regarding his disabling condition, how it impacts his ability to do the job, and what type of accommodations he would need to support him so he could succeed in the job. Cutting further stated if he did not comply, she would proceed with termination. (Jt. Ex. 69) This email was copied to Riley, Connelly and the Assistant Commissioner of DDS, Barbara Kinney. One day earlier on December 30th, Cutting had asked Reilly if Complainant would report to someone or remain with the training team and she recommended he remain with the training team since she was to be responsible for his final "write up." (Jt. Ex. 69) Cutting never met with Complainant to discuss her final written evaluation of his performance.

31. On January 7, 2010, after the training had ended, Complainant provided Respondent with a three-sentence doctor's note from 1997 written by an internist, Dr. Mitchell Levine. (Jt. Ex. 103) The note stated that Complainant has a history of dyslexia and learning disability based on past testing and that he has symptoms of ADD with easy distractibility and difficulty with focus. (Jt. Ex. 103) Complainant sent an email addressed to the Training Department along with this letter suggesting some possible accommodations to assist him in working with the AS400 computer system. These included working collaboratively with management, having a

private cubicle to be free from distractions, the ability to place notes with reminders of work procedures on the wall, being allowed to use a tape recorder during meetings, receiving written instructions via email, and extending his employment beyond six months to provide him with a fair evaluation of his ability to work as a VDE. (Jt. Ex. 70) Complainant felt that six months was an insufficient time to evaluate his ability to perform the VDE job, given that his impairments affected his ability to learn the AS400 computer system. He expressed the hope that at the end of his six month probationary period, which was April 16, 2010, his employer would reevaluate his ability to perform the job and discuss his ability to succeed in the job. No one at MRC responded to Complainant's January 7, 2010 email. Complainant testified, "it was like a lost email."

32. At the Hearing, Respondent asserted that most of Complainant's suggestions for accommodations were provided to him. Cutting asserted that Complainant received written instructions from trainers and senior VDE's through notes placed in each case file via the AS400 computer system and that he disregarded or did not follow these instructions. Lists of work procedures were available in the training manuals he received. He was assigned to his own cubicle once the training was complete. While Respondent had the option to enter into an agreement with Complainant's union, Alliance, SEIU, Local 509, to extend Complainant's six-month probationary period under the CBA to provide management with additional time to evaluate his performance, Cutting testified that she was unaware of this ever having been done before. (Jt. Exs. 102, 113) Neither she nor anyone else at MRC discussed or explored this possible accommodation with Complainant after receipt of this letter or after the training session was completed. (Cutting Testimony; Savage Testimony) Cutting did not interpret

Complainant's list of suggested accommodations as all inclusive. Re-training or extending Complainant's training was never considered or suggested as an option.

33. Cutting claimed that exploring and providing reasonable accommodations to a probationary employee was not her responsibility but was up to Connelly and the individual employee. According to Connelly, exploring and providing reasonable accommodations to probationary employees is a responsibility that she shared with managers. However, Connelly testified that MRC does not expect its managers, supervisors, or administrators to initiate a dialogue about reasonable accommodation with employees who have hidden disabilities, as it is typically the burden of the employee to initiate such conversations. According to Connelly, an exception to this would be if an employee lacks the capacity to request an accommodation or is unable to articulate a request. I find that Complainant had some difficulty articulating what accommodations would be helpful. It was clear that he needed some professional guidance. Connelly did not see Complainant's January 7, 2010 email suggesting specific accommodations at the time but was aware of his requests for accommodation. Cutting testified that Connelly never contacted her to inform her of Complainant's disability or to discuss providing him with a reasonable accommodation. (Cutting Testimony; Connelly Testimony)

34. At the conclusion of Cutting's formal training on December 31, 2009, Complainant and the other trainees remained in Cutting's Training Department for several weeks while awaiting assignment to their eventual unit supervisors and various staff continued to coach Complainant and review his work. (Savage and Cutting Testimony; Jt. Exs. 73, Ex. R-99 bates nos.004639, 642-643,654,657-658) One of the interim examiners assigned to monitor Complainant's work emailed Cutting on January 13, 2009, that she "was worried about how he develops a case," and

went on to cite some tasks he had neglected. She noted that she “will be keeping a close eye on him and informing (her) of any further issues or improvement. (Jt. Ex. 73)

35. Complainant was eventually transferred to work in a VDE unit under supervisor Phillip Walsh sometime around late January of 2010. He worked for approximately seven weeks without additional training on the AS400 Computer System. In a departure from her usual practice, Cutting maintained an ongoing dialogue with Walsh about Complainant’s performance. (Cutting Testimony) Cutting testified that Walsh asked her why Complainant was placed in a unit on the floor. She stated that the answers to his question were contained in her final evaluation of Complainant which was not completed until Complainant’s termination. Cutting testified that she generally tries to complete her final evaluation of a VDE trainee as soon as possible because a supervisor would need it before the VDE is assigned to his or her unit. Id. On February 2, 2010, Reilly emailed Cutting to inquire when her final evaluation of Complainant would be completed. (Jt. Ex. 82; R-Ex. 98, bates no. 000240)

36. According to Complainant, Walsh rarely met with him but provided him with feedback about his performance through emails a few times a week. He testified that Walsh praised him for moving a lot of cases, working hard, coming in early and leaving late, but criticized him for not being trained on case adjudication. Walsh’s emails to Complainant in February 2010 indicate work needing to be done. (Ex. R-99, bates nos. 004632, 4633,4634,4635, 4636,4637,4638,4644-4648) Complainant testified that case adjudication would require more proficiency in learning the final stages of the AS 400 system, which he was having trouble mastering. According to Cutting it takes between two and four years to master the VDE position. Complainant stated that at no point did Walsh indicate that his job was in jeopardy. On February 24, 2010, Lori Stevens emailed Complainant that there were 15 cases of his that

needed immediate action and the he needed to follow his supervisor's instructions. (Ex. R-99 bates. Nos. 004629-4631)

37. On February 25, 2010, four and one-half months into his probationary period, Complainant met with Reilly and Steven, who verbally informed him that his employment was terminated. He was also presented with a letter of termination and, for the first time, a copy of Cutting's final evaluation of his training, also dated February 25, 2010. (Jt. Ex. 83) At the end of the meeting Complainant was required to turn in his badge and was escorted out of the building. On April 27, Reilly completed a "Work Activity Questionnaire" regarding Complainant's termination noting that Complainant was not able to complete all the job duties without special assistance and did not complete his work in the same amount of time as employees in similar positions. There was no mention of Complainant's difficulties learning the AS400 system. (Jt. Ex. 86)

38. Subsequent to his termination, Complainant telephoned Connelly to register his concerns about his termination. She advised him to put his concerns in writing to her. On March 1, 2010, Complainant emailed an internal complaint to Connelly claiming that he believed his civil rights had been violated and asking her to investigate the circumstances of his termination. He asserted that Cutting's evaluation of him was a mischaracterization of his work performance. (Jt. Ex. 87) Connelly testified that she did not have sufficient information to opine on whether Complaint's relationship with Cutting was strained and assumed that his complaint was centered solely upon his claim that he was not provided with reasonable accommodations as a VDE. Connelly did not communicate again with Complainant until she had concluded her investigation of his complaint and wrote him a letter indicating that she found no factual support for his charges.

39. Connelly did not interview Cutting or other personnel in the MRC training department who had knowledge of Complainant's charges. She stated she looked into whether MRC had provided Complainant with the reasonable accommodations he had requested and claims she was assured that they were provided. On March 3, 2010, two days after Complainant's email, Connelly completed a "draft" response to Complainant's charges purportedly based on a review of "certain written document pertinent to (his) situation" and after speaking with "various agency officials about what led up to the decision to terminate (his) employment. (Jt. Ex. 89, Ex. R-98 bates nos. 00243-245) She concluded in the draft that Complainant's termination did not arise from disability discrimination. That same day she sent a copy of this draft to Reilly, MRC General Counsel and two others to review asking for feedback and noting that she had not yet had an opportunity to speak to them about Complainant's charges. (Jt. Ex. 90; R-Ex. 98 bates no. 00241) Reilly forwarded the draft to Cutting and Stevens asking for their opinions about where to strengthen it. (Jt. Ex. 90) Cutting provided a two page response to Reilly's request on March 4, 2010. Her response focused on the training manuals, Complainant's failure to follow instructions in training, his unresponsiveness to questions, and the length of time it took him to read and understand the notes put in his cases, and that he was often confused about who the claimant was. (Jt. Ex. 90 bates nos. 00249-00250) Absent from her response was any mention of Complainant's learning disability or ADD, his January 7, 2010 request to the Training Department for a reasonable accommodation to help him better learn the AS400 computer system or what steps she took to follow-up with Complainant to explore such request.

40. In a letter to Complainant dated March 9, 2010, Connelly summarized the finding of her investigation of his civil rights complaint. (Jt. Ex. 93) She concluded that MRC's termination of Complainant was justified and the his rights were not violated. Connelly did not speak to any

of the principals involved with Complainant's employment, did not interview Complainant and based her report on review of incomplete records. She did not determine why Reilly and Cutting threatened Complainant with termination as early as December 9, 2009, pressuring him to resign within 24 hours in lieu of termination or why Cutting demanded a doctor's note with a diagnosis of his disability after he refused to quit. She also did not explore whether the basis for his termination was related to his disabilities or to his seeking reasonable accommodations in the workplace. (Jt. Ex. 93; Jt. Exs. 89-92)

41. As a consequence of his termination, Complainant lost his health insurance and other benefits and became eligible for Mass Health, an MBTA disability pass, food stamps and an Electronic Benefits Transfer card. (Savage test) After his termination, Complainant applied for unemployment compensation and Social Security Disability benefits. (Jt. Ex. 94, 95, 111) At the time of his hire at MRC, Complainant's annual salary as a VDE (Grade 20 at Step 2) was \$44,643.30. (Jt. Exs. 19, 113) In 2010 his lost wages were approximately \$36,705.88; in 2011 approximately \$48,145.52; in 2012 his lost wages were \$52,239.05. In accordance with the current CBA, had he remained working in the same position his annual salary would have risen to \$64,379.64 by October 2015, including a step increase on his anniversary date of October 13, 2015. Complainant is claiming a total of \$300,809.87 in back pay for lost wages from 2009 to October 22, 2015. (Jt. Ex. 113; CBA salary rates) However, on October 7, 2012, Complainant's psychologist Dr. Zieff recommended that Complainant work only part time. Dr. Zieff opined that it was not in Complainant's best interests to work full time as far as his emotional and mental health are concerned and that he not seek full-time employment. He stated that "Complainant's depression and periodic anxiety have caused some impairment in his functioning and has disabled him from being able to work on a full time basis." He also noted that when

Complainant had worked full time in the past “his level of depression and anxiety have increased due to the added stress and demands in his life.” (Jt. Ex. 78) In a letter dated April 22, 2013, Dr. Zieff commented that Complainant had been on long-term disability at a few junctures over the past few years, but his functioning had improved to the extent that he could work on a part-time basis. (Jt. Ex. 81) Based on Dr. Zieff’s opinion on the state of Complainant’s mental health, the fact that he had been in treatment for depression and anxiety that appeared to have a biological component, for many years, and that fact that he received disability benefits for periods of time, it is entirely too speculative to conclude that Complainant would have continued working full time at MRC through October 2015 had he not been terminated from his VDE position. Both prior to and since his termination, Complainant was employed only in temporary or part-time positions. For the years 2011 and 2012 Complainant earned a total of only \$15,352.04 in mitigation of lost wages. He has been employed since 2012 as a Peer Specialist for the Massachusetts Department of Mental Health for 20 hours per week earning approximately \$25,000 for 2015, and finds the position very satisfying. (Jt. Ex. 107, Dr. Garcia note on May 10, 2012) (Jt. Exs. 111, 112) For these reasons, I find that he is entitled to back pay from Respondent only through October 2012.

42. Complainant suffered significant emotional distress as a result of Respondent’s treatment surrounding his disability, difficulty learning the job, and his termination. He stated that he felt very embarrassed and humiliated by Cutting’s abusive mistreatment of him. Her constant berating of him and his abilities made him feel belittled and demeaned. He became so intimidated by her behavior that he stopped asking questions in class and talking to her. He was frightened in one meeting that she was going to hit him over the head. He was hesitant to provide Cutting with information from his psychologist, Dr. Zeiff, because he did not trust her

with his confidential medical information and had no confidence that she would treat his medical information sensitively. At one point he became so upset over Cutting's mistreatment that he mistakenly took a wrong train home after work, and had to pay a \$35 cab fare to get home.

43. Complainant was in treatment with Dr. Zeiff beginning in November of 2006. (Jt. Ex. 105) In a letter dated April 19, 2013, Dr. Zeiff noted that Complainant "experienced both acute anxiety and depression over his experience working for the Disability Determination Services at the Massachusetts Rehabilitation Commission... and during the period Mr. Savage worked for the Disability Determination Services, he experienced acute anxiety due to the high level of stress he experienced at his job... his experience of not receiving sufficient accommodations to his learning disabilities cause him both acute emotional distress and depression in feeling that he had been discriminated toward on the job." (Jt. Ex. 106)

44. Complainant was also in treatment with a psychiatrist, Dr. Byron Garcia, at MGH from 2008 up to the time of hearing. In October of 2013 Dr. Garcia noted that Complainant had "reported a great deal of anxiety and distress related to his experience working at the Massachusetts Rehabilitation Commission." (Jt. Ex. 107) Dr. Garcia prescribed Wellbutrin and Prozac for depression and ADD and Ativan for anxiety. (Jt. Ex. 107) Complainant has been treated for depression and anxiety since 2008 both before and after his employment at MRC and he continues to take medication. Id.

45. Complainant was so depressed after his termination that he was afraid he might "jump in front of a train" on his way home. He felt depressed and anxious, but also frustrated, humiliated and angered over his mistreatment by this former employer and the loss of a job that he had high expectations he would succeed and be happy in. He testified that when he was terminated he felt as if his "heart had been ripped out." The loss of his job left him feeling anxious, isolated,

lonely and emotionally shut off from his immediate family with whom he is very close. He testified that he would “wake up at night and wonder how he got in such a mess,” and testified, he “was in pretty rough shape.” Complainant had suffered from depression and anxiety for some time and was aware of his symptoms and when they were exacerbated. He understood that in order to cope with his illness he needed to seek professional help, take necessary medication, have a goal and stay busy by volunteering his services to the Red Cross and a food pantry in Boston.

46. After his termination from MRC, Complainant was also seen by his primary care physician, Dr. Levine. (Jt. Ex. 108) According to Dr. Levine’s medical records, Complainant reported on May 21, 2010 and May 25, 2011 that he was not working and feeling depressed. *Id.* Complainant’s brother, Robert Savage testified credibly about the significant emotional distress Complainant suffered from the abusive treatment he was subjected to while working at MRC and about how hard he had worked to receive higher education, how enthusiastic he was initially at being hired by MRC and how devastated he was by his termination. Robert Savage’s testimony was very detailed and compelling and he provided great insight into Complainant’s emotional health and his psyche during and after his termination from Respondent. (Testimony of Robert Savage) At the time of the hearing, Complainant still remained profoundly upset and angered over the discriminatory treatment he experienced at MRC and the damage incurred to his reputation.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with or without a reasonable accommodation. The statute prohibits discrimination against

persons with disabilities who are capable of performing the essential functions of the job with an accommodation and requires employers to provide reasonable accommodation to such disabled employees unless they can demonstrate that the accommodation sought would impose an undue hardship on the employer's business.

Complainant asserts that he is a person with multiple learning disabilities and mental impairments and that Respondent subjected him to a hostile work environment by materially interfering with the terms and conditions of his employment because of his disability, failed to explore by means of an interactive dialogue, or to provide him with reasonable accommodations that would assist him in performing his job, and terminated his employment for reasons related to his disability.

A. Failure to Accommodate

In order to prevail on a claim of handicap discrimination where Complainant alleges failure to provide a reasonable accommodation, Complainant must demonstrate that: (1) he is a "handicapped person," (2) that he is an otherwise qualified handicapped person," (3) that he needed a reasonable accommodation to perform his job; and (4) that the employer was aware of his handicap and the need for a reasonable accommodation; (5) that his employer was aware or could have become aware of a means to reasonably accommodate Complainant's handicap; and (6) the employer failed to provide him with a reasonable accommodation. *Hall v. Department of Mental Retardation*, 27 MDLR 235 (2005). MCAD Handicap Guidelines, p. 33, 20 MDLR (1998).

Complainant has established that he is disabled based upon his medical diagnosis and long history of treatment for Dyslexia, ADD, and other mental impairments including depression and anxiety. Complainant was otherwise qualified to perform the job as discussed in more detail

below. His education and employment history caused Respondent to grant him a higher salary step than entry level given his experience. Respondent was made aware of Complainant's disabilities and did not engage in a dialogue to explore appropriate accommodations for him.

Respondent asserts that Complainant's disabilities were not obvious to a reasonable person and therefore MRC could not reasonably have known of his disabilities. It argues that because Complainant's impairments were hidden and not discernable, he was under a more stringent obligation to be forthcoming with information about his limitations, and that he failed to do so. However, Connelly recognized the fact that a disabled individual's obligation to identify impairments and to seek accommodations may be hampered by an inability to articulate the precise impact his limitations have on his ability to perform the essential functions of the job or to articulate appropriate accommodations.

At the outset, I note it was apparent, even to the most casual observer, that Complainant has learning disabilities. More importantly, Complainant disclosed that he is a disabled individual when he self-identified as such on his application to MRC and later in a form disclosure to the Director of Diversity. Complainant also verbally notified Cutting, Connelly, and Pat Dixon at various times that he suffers from Dyslexia and ADD, is easily distracted, and reads and writes more slowly because of these impairments. As early as November 18, 2009, he notified Connelly in writing that he might need an accommodation for his learning disability and ADD. Even prior to any disclosure by Complainant, the facts strongly suggest that Cutting was aware of, or at the very least suspected, that Complainant had a learning disability or ADD, given her training, experience, position, her familiarity with mental impairments and her observation of Complainant's struggles. Therefore, Respondent's assertion that it was not aware of Complainant's disabilities and did not regard him as disabled is not credible.

Respondent further asserts that Complainant was under an obligation to identify his handicap, its limitations and the possible accommodations with some specificity. Respondent claims he failed to do so for many months and was subsequently afforded all the accommodations he sought. This assertion ignores the more complicated issue of Complainant's inability to articulate how his functional limitations impacted his ability to do the job. He clearly had difficulty with focus and concentration, processed information more slowly, and benefitted from repetition. Learning the AS400 computer system and understanding and carrying out basic instructions related to that system was challenging due to his learning disabilities.

Complainant was also to some degree unable to articulate the specific accommodations he needed to successfully learn the AS400 computer system and how his instruction might be altered to meet his needs. This is evidenced by the fact that a number of the accommodations he mentioned in his January 7, 2010 email were not particularly helpful in addressing his needs. That he was limited in his ability to be an effective advocate in this regard was more than likely apparent to Cutting and Connelly from early on. Nevertheless, he received little to no guidance from Respondent surrounding these issues. Rather than explore and discuss potential effective strategies to deal with Complainant's obvious limitations or to seek some expert consultation on how to address those limitations, arguably something within MRC's expertise, Connolly referred him to an on-line source called the Job Accommodation Network, to look up on his own suggestions for accommodation. Respondent placed the entire burden on Complainant to seek and provide medical information and provide suggestions from his health care providers under threat of imminent termination if he did not do so. It argues that he failed to do this in an effective way. The result of Cutting's ultimatum was to further exacerbate Complainant's stress and anxiety, making a productive solution less likely.

In response to Respondent's request, Complainant told Cutting he did not have a physician at that time and was waiting for his health insurance to become active. Given Cutting's abusive treatment of Complainant, he did not trust her to respect his privacy or the confidentiality of information from his mental health providers. Had she approached him, with any semblance of consideration for his impairments, he likely would have been more forthcoming with information about his mental disabilities and cooperated more fully in providing access to his medical information. However, no one at Respondent engaged Complainant in a meaningful discussion about his difficulty in learning the computer system or how instruction of the computer system might be altered to suit his needs. He was basically told to sink or swim. Cutting persisted in pointing out his errors and re-iterating useless directives such as pay attention, and follow instructions, in the face of clear evidence that Complainant did not comprehend the program. This situation was arguably exacerbated by Complainant's inability to articulate what he needed and the fact that he was significantly stressed and distracted. As stated above, his insufficient response to requests for medical information was largely due to his distrust of Cutting. He experienced great stress and feelings of humiliation caused by her insensitive and bullying approach to dealing with him like a child who was misbehaving. Moreover, there was clearly a dearth of communication between Cutting and Connelly as to how to better assist Complainant. The evidence suggests an absence of collaboration and little understanding of who was responsible for providing this assistance.

Respondent asserts that Complainant did not establish that he was capable of performing the essential functions of the job of VDE, which included operating the AS400 computer system, even with the accommodations he sought and is therefore not a qualified person with a disability within the meaning of G.L. c. 151B. Notwithstanding Respondent's claim to the contrary,

Complainant would likely have been capable of performing the essential functions of his entry level position had he been given the appropriate accommodations, particularly more time to learn the AS400 computer system, with proper training to accommodate his Dyslexia, ADD, and its inherent distractibility. There is ample evidence that Complainant could perform the essential functions of the position. He was deemed eligible for recruitment pay in recognition of his relevant training and experience in vocational rehabilitation, he had significant education and work experience in vocational rehabilitation, he understood the concepts required to do the job as evidenced by his correctly identifying in training class that a claimant had been incorrectly denied benefits and passing all his written examinations during his MRC training. He also understood the concept of "day 1 development" as evidenced by his preparing cases for adjudication during his assignment to Walsh's unit. Had he been given more time and support to learn the AS400 computer system which was complex and confusing to him, he likely would have been able to meet the performance standards for the VDE position.

If a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Figuroa v. Springfield Transit Management, 23 MDLR 17 (2001). The employee's initial request for an accommodation triggers the employer's obligation to participate in this interactive process to determine if an accommodation is feasible. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations. The request for a reasonable accommodation on the part of a

qualified handicapped employee requires the employer to engage in a direct, open, and meaningful communication with the employee. See Mazeikus v. Northwest Airlines, Inc., 22 MDLR 63, 68 (2000). The dialogue should include an identification of the employee's limitations and the potential adjustments to the work environment that would allow the employee to overcome those limitations. Id.

Respondent's failure to engage in any meaningful communication with Complainant to determine the precise nature of the problems he was encountering and to fashion some meaningful accommodation focused on his difficulty learning the computer system violated the obligation of Massachusetts employers to engage in an interactive process with a disabled employee who requests or requires an accommodation. Id. at 341-342, n.16, *citing* Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648-649 (2004); MCAD Handicap Guidelines (recognizing that an employer is obligated to participate in an interactive process where disabled employee requesting an accommodation) Respondent's failure to meet its obligation to Complainant in this case is particularly troubling given the nature of the work and mission of MRC with its focus on rehabilitating disabled individuals and helping them succeed in the workplace.

Respondent asserts that it accommodated Complainant when it provided him with the opportunity for individual tutoring outside of the classroom for a number of weeks and asserts that Complainant did not take full advantage of this offer and stopped attending these sessions. It soon became apparent that such tutoring was not a successful solution, largely because Complainant felt it did not address his difficulties with the computer system and he was concerned about missing class time and falling further behind. He continued to stress that it was the computer system that he had difficulty understanding and mastering. The computer program was complex and confusing with multiple functions and acronyms. The training manuals for learning the system were voluminous and extensive. At the hearing Complainant described how his life-long inability to write, absorb

and process information quickly interfered with his keeping pace with the rapid instruction delivered by Cutting and her trainers. In the end, Respondent did not consider the impact of Complainant's disability on his ability to perform the purported essential functions of the position; nor did it explore the possibility of a reasonable accommodation to assist him in doing so. Figueroa, supra, at 21.

The reasonableness of the accommodation turns in large part on whether its implementation will be will be unduly burdensome to Respondent's operations and finances and how significantly it will adversely impact Respondent's business. MCAD Handicap Guidelines, p. 26 20 MDLR (1998). While "there is no obligation to undertake an interactive process if an employer can conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business," an employer cannot refuse to engage in the interactive process based on its own belief that an accommodation is futile. Massachusetts Bay Transportation Authority v. Massachusetts Commission Against Discrimination et al, 450 Mass. 327, 342 (2008). Respondent did not demonstrate undue hardship or that any accommodation would be futile. Had Respondent pursued more meaningful accommodations along the lines suggested below, there could likely have been a different outcome. Given that this did not occur, there is insufficient evidence that any accommodation would have been futile. A fact-finder cannot conclude with any reasonable certainty that proper accommodations that addressed Complainant's actual limitations might not have proved fruitful.

Had Respondent's training and diversity departments engaged in meaningful communication with Complainant to strategize a collaborative solution in lieu of berating him for his errors or expecting him to fashion a solution on his own, a number of options for accommodating him would have been obvious. They could have included re-training Complainant on the computer system by allowing him to repeat part or all of another training class, while reducing

his caseload. Another other option was taping and making available videos of the training sessions so that Complainant could review them at his own pace on his own time. Respondent could also have considered extending Complainant's probationary period of employment to allow him more time to learn and acclimate to the job, an option that is available in consultation with the union. Complainant actually expressed his concern that six months would be an insufficient amount of time to evaluate his performance in his January 7, 2010 list of accommodations, suggesting that he be given more time to learn the computer system and tasks required of him. Respondent did not respond to Complainant's January 7, 2010 email and offered no evidence that other alternatives were considered or that they would have constituted an undue burden on its operations. Rather, than focus on potential solutions, Cutting seemed unable to comprehend Complainant's difficulties learning the job and showed no genuine interest in seeking alternative learning techniques to train him. Rather, she seemed more intent on terminating Complainant's employment as quickly as possible while he was on probation to avoid dealing with the collective bargaining rights that would adhere once he became a non-probationary employee. This is particularly distressing given MRC's mission and her role as training director. Despite Complainant's notice to Connelly that he was experiencing difficulties with Cutting and his formal filing of a complaint, Connelly neglected to investigate the situation fully or to intervene on Complainant's behalf.

B. Harassment/ Hostile Work Environment

While not precisely couched in these terms, Complainant's allegations that he was subjected to disparate terms and conditions of employment based on his disability, are largely a claim that he was subjected to a hostile work environment on account of his disability. The elements of a hostile work environment as developed in sexual harassment cases have been extended to other protected classes, such as race, disability and age. See Beldo v.UMass Boston, 20 MDLR 105, 111 (1998); Connors v. Luther and Luther, Enterprises, 32 MDLR 71, 77 (2010)

In order to establish a “hostile work environment” based on his disability, Complainant must prove by credible evidence that: (1) he is a handicapped individual; (2) that he was the target of speech or conduct based on his disability ; (3) the speech or conduct was sufficiently severe or pervasive as to alter the conditions of his employment and create an abusive work environment; and (4) the harassment was carried out by an employee with a supervisory relationship or Respondent knew or should have known of the harassment and failed to take prompt remedial action. College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Connors, supra.

The objective standard for determining unwelcome conduct must be evaluated from the perspective of a reasonable person. The reasonable person inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker’s performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) *citing* Harris v. Forklift Systems, Inc., 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000).

The subjective standard measures whether the individual claiming hostile work environment harassment personally experienced the behavior as unwelcome. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing the subjective component of sexual harassment as ... “in the eye of the beholder.”). An employee who does not personally experience the behavior to be intimidating, humiliating or offensive is not a victim within the meaning of the law, even if other individuals might consider the same behavior to be hostile. See Sexual Harassment in the Workplace Guidelines at II C 3; Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

There is sufficient evidence to conclude that Cutting made few allowances for Complainant's disability and mistreated him for reasons related to his disability. Her behavior was sufficiently pervasive and abusive to create a hostile work environment for him. Complainant claimed that she belittled and humiliated him on a regular basis, created an atmosphere where he felt he could no longer ask questions in class or even speak to Cutting. She was abrupt, impatient and intimidating towards him as demonstrated by her scolding him in class in front of his peers for making mistakes and by the tone and content of her numerous emails to Complainant which were caustic and punitive and which underscore her animosity toward him for his perceived shortcomings. One month into Complainant's training, Cutting admittedly lost patience with him, brought him to her office and pounded her fists on her desk and yelled that he could not do the VDE job. Cutting acknowledged in emails to her superior Reilly that she felt like hitting Complainant over the head and was at her wits end with him. She threatened him with termination if he did not resign and subsequently threatened termination again if he did not provide her with medical information. Their relationship became so dysfunctional that they had little personal interaction except by email because Complainant sought to avoid the hostility and intimidation of any personal encounter.

Cutting's conduct toward Complainant was demeaning, bullying, and intimidating and negatively affected the terms and conditions of his employment. As a result of the hostile environment that Complainant encountered at MRC, his symptoms of ADD, which were triggered by the stress, increased. Cutting's harassment of Complainant compounded the effects of his disabilities, making it even more difficult for him to learn the computer system in order to successfully process claims. I find that Cutting's behavior was directly related to Complainant's disability.

Respondent was aware of and responsible for the atmosphere of hostility towards Complainant. Complainant told others, particularly Connelly, that he had difficulty dealing with Cutting and experienced frustration with her and the training department's refusal to acknowledge that he read, wrote, and processed information more slowly. I conclude that Complainant was treated more harshly and subjected to a hostile work environment on account of his disability in violation of G.L. c. 151B.

C. Termination

Complainant asserts that his termination was the culmination of Respondent's adverse personnel actions toward him. In order to establish a claim of termination from employment on account of his disability, Complainant must demonstrate that he (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by his employer; and (4) the adverse employment action occurred under circumstances that suggest it was based on his disability. Tate v. Department of Mental Health, 419 Mass. 356, 361 (1995); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, (1998).

Complainant has satisfied the elements of a prima facie case by showing that he is disabled within the meaning of the law, that he likely could have performed the VDE position with reasonable accommodations including allowing him more time to learn and master the computer system, and that he was terminated under circumstances that give rise to the inference of handicap discrimination.

Respondent may rebut the presumption of discrimination created by the employee's prima facie case by demonstrating that it had a legitimate non-discriminatory reason for its action. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, (2000)

Respondent asserts that Complainant's employment was terminated because he was unable to perform the essential functions of job of VDE, particularly "day 1 development" and case adjudication, with the reasonable accommodations he requested during the period of his training and after he was assigned to a unit. There is certainly credible evidence that Complainant continued to struggle to perform certain essential functions of the VDE position and that much of his difficulty was related to his understanding and mastering the complicated computer system, which he found overwhelming and confusing. Others, besides Cutting noted his deficiencies. While this seems like a legitimate reason on its face it begs the question of Respondent's failure to recognize the extent to which Complainant's disabilities caused his struggles and to offer, and at the very least, attempt any genuine solutions .

If Respondent articulates a non-discriminatory reason, Complainant must prove by a preponderance of the evidence that these reasons are a pretext and that Respondents "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493,501 (2001); See, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, supra. at 501. Complainant retains the ultimate burden of proving that Respondents' adverse action was the result of discriminatory animus. Id.; Abramian, 432 Mass at 117. Complainant has satisfied the legal burdens of production and persuasion by demonstrating that he could have met the expectations of Respondent but for the fact that he was not reasonably accommodated for his mental impairments. He has demonstrated that armed with knowledge of his disabilities, management and its trainers refused to investigate early on how best to train an employee like Complainant who might require a different approach than other students. To the contrary, MRC's

management denied Complainant suitable training to accommodate his Dyslexia and ADD and instead issued him the ultimatum that he resign in 24 hours or face termination proceedings. Complainant suffered a steady barrage of criticism, harassment and hostility from Cutting. He did not receive a final evaluation until the day of his termination on February 25, 2010. In lieu of re-training Complainant, as it had done with others, management instead elected to fire him one and ½ months prior to the expiration of his probationary period. This was clearly Cutting's goal from early on in his training. She freely admitted that she had no patience with Complainant and she convinced management that termination was the only option.

Connelly's investigation into Complainant's termination failed to consider or address many of the underlying issues discussed above. She proceeded on the assumption that Complainant had been granted the reasonable accommodations he sought and reached a conclusion that his termination was justified and that there had been no violations of Complainant's rights. She drafted a report to that effect without interviewing Complainant or any of the principal parties involved including MRC's trainers and managers. Rather than fully investigate Complainant's charges, she prepared a conclusion and then sought support for her findings after the fact. The failure to conduct a fair, thorough, and unbiased investigation can also be evidence of pretext. See Smothers v. Solvay Chems, Inc. 740 F.3d 530, 542 (2014); Haddad v. Wal-Mart Stores, Inc. 455 Mass. 91, 101(2009); Saxe v. Baystate Med. Ctr., Inc., 2015 Mass Super. LEXIS *6, 13 (Hampton Sup.Ct. July 2015) Connelly was likely not a neutral investigator of Complainant's charges. The fact that she worked closely with Cutting and respected Cutting seems to have clouded her judgment to the detriment of Complainant in this matter. Given Respondent's failure consider the reasons for Complainant's deficiencies, which

were wholly related to his disabilities, I conclude that his termination was motivated by unlawful discrimination in violation of G.L. c. 151B.

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. *See Stonehill College v. MCAD*, 441 Mass 549 (2004).

Since Complainant was denied the opportunity to demonstrate that he could have, with additional time and training, learned to master Respondent's complicated computer system, it is impossible to predict a conclusive outcome for his long-term employment with Respondent. I have found that it is too speculative to conclude that Complainant would have continued to work full time at Respondent through October 2015, based on his psychiatrist's diagnosis and recommendations in October 2012, and based on his work history. Given these factors, it is not possible to conclude with any certainty that Complainant would have been able to perform the full-time job of VDE beyond October of 2012. The evidence is that Complainant never worked full time again after he was terminated from MRC and there is some question about whether his ongoing mental health issues would have allowed him to do so beyond a certain point. Both his doctors recommended against his working full time in subsequent years. Thus, I conclude that he is entitled to back pay only through October 2012 in the amount of \$137,090.45, minus his earnings in 2011 and 2012 which were \$23,785.04, for a total back pay award of \$113,305.41.

Complainant is entitled to damages for emotional distress resulting from the hostile work environment he was subjected to while at MRC and from his termination. Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider

in awarding such damages are the nature and character of the alleged harm, the severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Id.* at 576. Such awards must rest on substantial evidence that the distress is causally connected to the act of discrimination. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” *Id.*

I note at the outset that Complainant has a history of suffering from depression and anxiety and was in treatment for these conditions prior to his employment with Respondent. Notwithstanding, the testimony from Complainant and his brother regarding the significant distress Complainant suffered as a result of Respondent’s actions was both credible and compelling. Complainant’s anxiety and depression were exacerbated by Cutting’s abusive treatment of him and her seeming inability to recognize the impact of his disabilities, but instead to blame him for them. Complainant experienced heightened stress, great frustration and embarrassment and humiliation from his interactions with Cutting. He suffered psychological harm as a direct result of her treatment as noted by his medical providers who discussed his depression and anxiety worsening and becoming more acute. He discussed his feelings with one mental health provider several times in 2010 and again in 2013 and was prescribed medication for his anxiety and depression. The emotional upset at work, further impacted Complainant’s ability to focus and perform the job and led him to seek the assistance of the Connelly, hoping that the situation with Cutting might improve. Complainant’s brother testified that Complainant was initially very enthusiastic about the job and suffered at great deal of embarrassment and humiliation at having been told he could not do the job of VDE and withdrew from his family. To the present day, Complainant remains deeply troubled from his experience at MRC. Given

all of the above and in consideration of Complainant's mental health history, I find that he is entitled to an award of \$100,000 for emotional distress.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law Respondent is hereby Ordered:

- 1) To cease and desist from any acts of discrimination on the basis of disability.
- 2) To pay to Complainant, Stephen Savage, the sum of \$113,305.41.00 in damages for lost wages, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 3) To pay to Complainant, Stephen Savage, the sum of \$100,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 4) Respondent shall take steps to ensure that its ADA/Diversity coordinators and trainers undergo additional instruction and training in providing reasonable accommodation to disabled individuals and in the investigation of complaints of discrimination based on disability, including appropriate procedures for interviewing witnesses and gathering information. Respondent shall notify the Commission of the measures it has undertaken to comply with this directive within three months of the issuance of this Order.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to §5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 25th day of May, 2016.



Eugenia M. Guastaferrri
Hearing Officer